IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1557

SPENCER MIMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH JUDICIAL CIRCUIT

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Petitioner, SPENCER MIMS, respectfully prays that a Writ of Certiorari will issue to review the Judgment of the United States Court of Appeals for the 8th Circuit, entered in this proceeding on February 8, 1977, and to review the denial of a rehearing of said proceeding, dated March 10, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, as well as the District Court opinion, have not been printed, but the said District Court findings and rulings are contained in the original record which has been supplied to the Court of Appeals in connection with the proceedings had therein. Counsel is requesting that the record be certified and transmitted to this Court on behalf of the instant petitioner.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on February 8, 1977. A timely petition for rehearing was denied on March 10, 1977. The jurisdiction of the Supreme Court is invoked under the provisions of Section 1254(1), Title 28 U.S.C., and Rules 19(b) and 22(c) of the Rules of the Supreme Court of the United States. An Order extending the time for the filing of the within petition for certiorari to May 9, 1977.

QUESTIONS PRESENTED

I. Can a Conviction for violation of the United States' Controlled Substances Laws stand, where the sole evidence establishing the appellant's knowing involvement in an alleged drug distribution conspiracy derives from the wire interception of a voice identified as being that of the appellant, SPENCER MIMS, by a DEA Agent, lacking aural expertise, whose only opportunity for observation of the specific aural character of the appellant's voice arose during conversations with the appellant upon his arrest, and, while listening to his testimony given in connection with a pre-trial suppression hearing, the fruits of which are by law inadmissible on the trial in chief; and, did such surreptitious obtaining of voice exemplars by the government agent, violate the petitioner's right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution, as well as his right to procedural and substantive due process under the Fifth Amendment, and accordingly void his conviction?

II. Can a conviction, based solely on circumstantial evidence, stand, as constitutionally valid, where the trial record reviewed does not support the ultimate inference of guilt beyond a reasonable doubt, and where the Court of Appeals clearly misinterpreted the testimony adduced on the trial, in order to make plausible its affirmance of the conviction, and in order to give validity to a clearly erroneous judgment in the face of a record, which viewed in accordance with *the actual proofs,* is totally

incapable of supporting the inference of guilty knowledge or participation, required in such cases of conspiracy, or involvement in any of the substantive offenses charged?

III. Can a jury trial be considered a "fair" one, before a "fair, impartial,unhurried jury," within the meaning of the Fifth and Sixth Amendments to the United States Constitution, where the jurors drawn to try the case are subjected, during the pre-Christmas holiday season, to sequestration, and to a trial schedule requiring their attendance upon the trial from 9:15 A.M. to 7:00 o'clock P.M., Monday thru Friday, and from 9:15 A.M. to 5:00 o'clock P.M., on Saturday; and when the case was submitted to them at 3:24 P.M. of Saturday, December 13, 1976, and they were required to reach a judgment, as to five separate defendants under a complex 15 count indictment, and where they returned guilty verdicts against all defendants without exception, on all counts, within five and one half hours, and by 8:57 P.M. of December 13, 1975; and, whether the setting of such a schedule by the trial judge, under the circumstances appertaining, constituted an unlawful abuse of discretion, and a perversion of the Speedy Trial provisions of the law, all in derogation of the defendant's indefeasible rights, ensured him by the Fifth and Sixth Amendments to the United States Constitution, to a fair trial, before a fair tribunal, uninfluenced and unaffected by judicially created artificial pressures?

IV. Whether the setting of the schedule outlined above constituted a denial to the defendant of his right to the effective assistance of counsel, in violation of rights guaranteed by the Sixth Amendment to the United States Constitution?

V. Whether a conviction which rests upon lay opinion as regards voice identification, can stand, absent a voice print, or spectogram, in light of the considerations discussed in the cases of *United States* v. *Baller,* cca 4, 1975, 519 F.2d 463; *United States* v. *Frank,* 511 F.2d 25, cca 6, 1975; and *United States* v. *McDaniel,* CA DC, 538 F.2d 408; and whether this conflict among respectable judicial authority should be settled?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the United States Constitution, provides:

"No person . . . shall be deprived of life, liberty, or property, without due process of law. . ."

Amendment VI to the United States Constitution, provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to have the assistance of counsel for his defence."

RULES OF COURT

Rule 45 of the Federal Rules of Criminal Procedure:

"In computing any period of time . . . . The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a Legal holiday . . . . "legal holiday," includes . . . . Christmay Day . . . ."

Rule 50 of the Federal Rules of Criminal Procedure:

"To minimize undue delay . . . each district court . . . shall prepare a plan for the prompt disposition of criminal cases which shall include rules relating to the time limits within which . . . the trial itself . . . , must take place . . . ."

STATEMENT OF THE CASE

On or about July 30, 1975, SPENCER MIMS was charged, along with five other co-defendants, in a 15 count indictment, with the offenses of conspiring to distribute heroin and cocaine, and to possess with intent to distribute these substances, and with 14 separate offenses of distribution of heroin and cocaine, Schedule I and II, Controlled substances.

Wire tap interception orders had been obtained, and, for purposes of this petition, only two of the interceptions related to the petitioner, Mims; one on May 9, 1975, and one on May 13,

1975. Neither of these calls was clearly, on the face, narcotics related. The call of May 9th was one in which the *recipient* of the call informed the caller (allegedly Mims) that he (Mims) had dropped off some suits which "they liked." (App. p. 39A)

The call of May 13, 1975, was again from the defendant, James Jackson to (ostensibly) Mims, in which Jackson stated that he wanted the "same suit all the way up." (App. p. 24 of opinion) The opinion of the Court of Appeals recited that Mims agreed to deliver immediately; and premised its judgment that the evidence against Mims was sufficient, upon surveillance which established that Mims, "shortly thereafter" drove to Jackson's home, and that Jackson thereafter delivered an ounce of heroin to the DEA agent, Vaughn.

The record however does not reflect that Mims went to Jackson's home. (As shown on pp. 1, 2, 3A, appendix) The testimony indicated that Mims drove to 5622 Highland Ave., Kansas City, Mo., was there 2 or 3 minutes; and no one ever saw the co-conspirator, Jackson, enter those premises, or exit them; but, Jackson was seen driving a car some 4 blocks distant from the premises, "in the area of 54th St." The record is totally devoid of any testimony even remotely suggestive of any delivery of contraband to Jackson, by Mims on this, or any other occasion.

The dates of May 9, and May 13, 1975, have significance because, on November 20, 1975, Mims, took the stand, in open court, in support of a motion to suppress and to quash and dismiss the indictment, at which time DEA Agent VAUGHN was surreptitiously listening to the aural peculiarities and characteristics of Mims' voice in order to obtain voice exemplars for comparison purposes to use on the trial. No notice of this activity was given either the defendant, or his attorney, at the time.

On the trial, DEA Agent, VAUGHN, who admitted having no aural expertise, undertook to identify Mims as being one of the callers in the May 9th and 13th calls described above. He admitted his identification was predicated upon his having heard Mims voice while testifying on the pre-trial motions in open court. (Appendix, pp. 8A, 9A)

The trial of the cause began December 1, 1975. The jury was ordered sequestered for the term of the trial. Additionally, the Court ordered the case to be tried from 9:15 A.M. of each day until 7:00 o'clock P.M. of each day, except Saturday, when the trial time was 9:15 A.M. till 5:00 o'clock P.M. (Appendix, p. 10A)

Objection was made to this procedure, as imposing upon the defendants' rights to confer with their counsel; to research the problems which might arise; and to rest. The defendants urged that the trial schedule itself was a strain on all parties concerned, and in truth a miscarriage of justice. (Appendix, pp. 11A to 14A) The court persisted in maintaining the schedule, citing among other things, his crowded docket. (Appendix, p. 15A)

At 3:24 P.M. of Saturday, December 13, 1975, the jury retired for its deliberations. At 8:35 P.M. the jury had reached its verdict as to all defendants. At 8:57 P.M. the jury formally returned its verdicts of guilt as against all of the defendants. Mims was found guilty of the conspiracy count, and of counts 8 and 10, additionally, which counts related to the transactions of May 9th and 13th, to which the telephone interceptions about which Agent Vaughn testified, related.

The foregoing facts sufficiently circumscribe the issues herein raised upon review via certiorari.

ARGUMENT ON THE LAW

I.

THE CONDUCT OF A SURREPTITIOUS AURAL SHOW UP, IN THE ABSENCE OF NOTICE TO THE PETITIONER, OR HIS COUNSEL, BY DEA AGENT VAUGHN, AND HIS USE OF VOICE EXEMPLARS SO OBTAINED IN FIRMING UP HIS IDENTIFICATION TESTIMONY ON THE TRIAL IN CHIEF, AS VOIDING THE CONVICTION OBTAINED, UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the within case, the petitioner, SPENCER MIMS, testified in connection with his motion to suppress and quash prior to trial. On the trial in chief, two crucial wire interceptions, supposedly involving the petitioner as a participant therein, were introduced against the defendant.

The identification of one of the voices participant as being SPENCER MIMS, was brought about through the testimony of DEA Agent, Harold T. Vaughn, who stated that he was able to identify the voice on the phone as being that of Mims, because he talked with him for 45 minutes, on the occasion of his arrest; listened to several tapes of him, and compared what he heard on the tapes with his recollection of Mims' voice as he had heard him testify on the pre-trial hearings.

What this identification testimony amounted to was an aural show up, made possible only because of the officer's exploitation of a proceeding to which the defendant was required to resort in vindication of rights which he believed he possessed under the constitution; and a proceeding which, by any fair reading of *Simmons* v. *United States,* 390 U.S. 377, 394, 19 L.Ed.2d 1247, 1259, 88 S. Ct. 967, 976, 1968, could not be so exploited.

Aural show ups are legally akin to line-ups. They are one and the same animal.

Thus, what is said of line-ups, and the fairness of their conduct, applies with equal force to aural show-ups. First, a line-up cannot be fatally suggestive. It is axiomatic, and needs actually no citation of authority to suggest that a line-up which has but one suspect in it would violate the constitution, as being improperly suggestive. Cf. *Stovall* v. *Denno,* 388 U.S. 293, 18 L.Ed.2d 1199, 87 S. Ct. 1967.

Likewise, an aural show-up, in which the identified person sits in a witness box and is viewed by his trial identifier, and is listened to as he speaks, is constitutionally defective; and any identification, in court, which is premised upon such a show up is tainted. Cf. *United States* v. *Ash,* 413 U.S. 300, 312, 37 L.Ed.2d 619, 628, 93 S. Ct. 2568.

The precise issue here raised, as to the suggestibility of an aural show up, and as to it being held surreptitiously, without order of court, or *notice to the defendant or his attorney,* has never been before the Supreme Court.

United States v. *Dionisio,* 410 U.S. 1, 35 L.Ed.2d 67, 93 S. Ct. 764, affirmed that aural show ups are akin to visual show ups. On pp. 14 of 410 U.S. and 79 of 35 L.Ed.2d, the Supreme Court suggested, "The physical characteristics of a person's voice . . . (are) like a man's facial characteristics . . . ." *United States* v. *Wade,* 388 U.S. 218, 18 L.Ed.2d 1149, 87 S. Ct. 1926, 1967, affirmed that a conviction resting on a suspect pre-trial identification procedure, which the accused was helpless to protect himself against, voids a conviction as a deprivation of Fifth Amendment rights.

In this age of increasing utilization of wire tap evidence in Criminal cases, the procedure employed for identification of unknown and suspect voices, must be every bit as subject to the rule of *Wade,* supra, and *Gilbert* v. *California,* 388 U.S. 263, 18 L.Ed.2d 1178, 87 S. Ct. 1951, as a pre-trial viewing of a suspect's "facial characteristics."

At the very least, the attorney representing the suspect must be informed of the fact that a pre-trial identification procedure is being conducted. See *Gilbert* v. *California,* supra. That was not done here.

Wade turned upon the fact that the identification procedure was defective because "the lineup was conducted *without notice* to, and in the absence of his counsel," (p. 223 of 388 U.S.), in derogation of the defendant's right to the effective assistance of counsel.

In this case, counsel was present at the pre-trial hearings when his client testified, but, *he had no notice given him of the fact that an aural show up was being simultaneously conducted.*

The Sixth Amendment right to the effective assistance of counsel required the giving of such notice to counsel, so that steps could be taken to assure the fair conduct of the prospective trial, and to preserve to the defendant a meaningful defense to the government's charges.

It is clear from other situations, that the surreptitious eliciting of evidence, cannot be resorted to by the government, from a constitutional standpoint. Such activity is absolutely proscribed. Cf. *Brewer* v. *Williams,* ____ U.S. ____, 51 L.Ed.2d 424, on p. 437; *Massiah* v. *United States,* 377 U.S. 201, 12 L.Ed.2d 246, 84 S. Ct. 1199.

Thus, here, where the only evidence relied upon by the Court of Appeals to sustain the conviction, and to connect the petitioner to the government's charges, rests on an aural show-up, surreptitiously conducted, in derogation of the petitioner's Sixth Amendment rights, without notice to him or his attorney, certiorari should be granted to define, in so important an area, the procedural requirements necessary for validation of aural identification testimony.

Petitioner believes the import of the line-up cases, *supra* coupled with *United States* v. *Dionisio, supra,* compels the conclusion that voice comparison, and the taking of voice exemplars should be accomplished with all of the safeguards attendant any other type of physical viewing, and, that in the within case, certiorari should be granted to clarify the limits which exist in this area.

II.

THE EVIDENTIARY INSUFFICIENCY OF THE EVIDENCE AGAINST THE PETITIONER, AND THE CONFLICT OF VIEW REGARDING THE SUFFICIENCY OF THE PROOFS, AS BETWEEN THE CIRCUITS.

As a part of the circumstantial case against the appellant, MIMS, the Court took the position that Mims circumstantially delivered drugs to the co-defendant, James Jackson, who in turn delivered the same drugs to Agent Vaughn. Yet the transcript does not support that thesis. On p. 1A of the appendix, testimony indicates that at about 3:30 P.M. of May 13th, Mims left his home and drove to an address known as 5622 Highland Ave., and that he was there for 2 or 3 minutes; and that while surveillance was being conducted on that premises, Mr. Jackson was never seen to enter it, or exit it; but that Jackson was seen driving a car some four blocks away, "in the area of 54th Street."

Accordingly, the finding of the Appeals court that "Surveillance revealed that *Mims then drove to Jackson's home,* and that shortly thereafter Jackson went from his home to Agent Vaughn's apartment and sold him one ounce of heroin," is not supported by the record at all. 5622 Highland Ave. was not the home of James Jackson, rather 4033 Oak St., Kansas City, Mo. (See p. 4A, appendix) As the record stands on this date, there was not even the opportunity for Mims to have any contact with Jackson prior to the delivery of heroin by Jackson to Agent Vaughn, and the Appeals Court erred grievously on this point.

Additionally, each and every other averment set forth in the opinion as a basis for sustaining Mims' conviction goes to mere association, and to circumstances which cannot be used to establish a case, if the law of other circuits were followed.

For example, in the Fifth Circuit, in *United States* v. *Suarez* and *Lester Chiong,* 487 F.2d 236, cca 5, 1973, *cert. den.* 415 U.S. 981, 39 L.Ed.2d 878, 94 S. Ct. 1572, the defendant Chiang was seen leaving and entering the house of a known dealer in

narcotics, carrying a small bag. The court held this circumstance to be insufficient to premise guilt upon.

To the same effect, the Ninth Circuit, in *United States* v. *Epperson,* 485 F.2d 514, cca 9, 1973, said that even presence in a room where Mescaline was found, coupled with association with the actual wrong-doer, was not enough to constitute one a conspirator.

To like effect was the Fifth Circuit's case of *United States* v. *Martin,* 483 F.2d 974, cca 5, 1973; and that of *United States* v. *Arroyave,* 477 F.2d 157, cca 5, 1973, where the Court struck down a conviction based upon the fact that his pick-up truck had been seen at other co-defendants' homes, when marijuana was delivered there. And, again, the Ninth Circuit, in *United States* v. *Whitman,* 469 F.2d 1370, cca 9, 1972, held that even being in a vehicle where narcotics might be carried is not enough to convict a person of involvement in a conspiracy.

Yet, in the within case, there is not a scintilla of direct proof of the petitioner having ever had his hand on any drugs. Certainly, in accord with the above-cited opinions, if the petitioner had been tried in the Fifth or Ninth Circuits, his conviction could not be maintained, for there is nothing claimed in this case occurred, which did not occur in the cases from other sister circuits; and thus, there is a conflict among the circuits upon what is substantially a common place fact situation. That conflict should be resolved by granting certiorari to review the judgment of the Eighth Circuit.

III & IV.

THE COERCIVE TRIAL SETTING; AND ITS EFFECT UPON THE TRIAL JURORS, ATTORNEYS, & DEFENDANTS.

42 years ago in *Brown* v. *Mississippi,* 297 U.S. 278, 80 L.Ed. 682, 56 S. Ct. 128, 1935, Chief Justice Hughes wrote in a highly relevant fashion of the constitutional meaning of the term "fair trial." He said, beginning on page 285 of 297 U.S. (p. 686 of 80 L.Ed.):

"The State is free to regulate the procedure in its courts in accordance with its own conceptions of policy, unless in doing so, it offends some principle of justice so rooted in the tradition of conscience of our people as to be ranked as fundamental . . . The freedom of the State in establishing its policy is the freedom of Constitutional government, and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, *it does not follow that it may substitute trial by ordeal.* The rack and the torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to conviction under mob domination (here we substitute the words, "by sly artificially created coercion") . . . Nor may a State, through the action of its officers, contrive a conviction through the pretense of a trial which in truth is "but used as a means of depriving a defendant of liberty through a deliberate deception of court . . .

The due process clause requires that State action whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . .

The duty of maintaining the constitutional rights of a person on trial . . . rises above mere rules of procedure, and whenever the court is clearly satisfied that such violations exist, it will refuse to sanction such violation, and will apply the corrective. . . ."

The Federal Rules of Criminal Procedure, in Rule 45 thereof, make clear, by inference at least, that Saturday is not a working day of Federal Courts. They also impliedly recognize the sanctity of Sundays, and legal holidays, including Christmas, as being non-working days. The underlying policy considerations flowing from the adoption of the Rule are manifest.

But, even apart from any formal Rules which might have been adopted for the conduct of court trials, the limitations of the human creature are well known and self-evident. Attorneys, defendants, and jurors are all mortal. None of them can be presumed to possess special or extraordinary powers of attention-span,comprehension or physical endurance.

No trial should ever be conducted under conditions which could be described as an "ordeal."

In a practical and realistic sense then, the appraisal of any given situation depends largely upon the appraiser's sensitivity. As Edward Markham, the poet, so well observed of the Man with the Hoe, "What to him are the Pleadides, . . . the sunset - the rose?"

The true character of "sophisticated coercion" has to be appreciated by equally as sophisticated minds. A Judge who, in the Christmas season, sequesters a trial jury, and then compels it to work 10 hours a day for 5 days a week, and 8 hours on the following Saturday of each week, when he should appreciate the anxieties experienced by the "average" juror, for his family, and the coming holiday, all during the month of December, and who keeps them locked up, for an undefined period of time, unable to shop for gifts, or to communicate with friends and family, or to organize their personal plans, has to be nothing less than callous, and at best cunning and devious.

The foregoing scenario did not involve a statement of certainty as to the length of any possible sequestration or service. It did not take into account the physical needs, or conditions, of the jurors, or their families. The jurors were in truth made to suffer an "ordeal" in every sense of the word.

Then, as to the defendants, and their counsel. Certainly, as Mr. Holliday, the attorney for Mr. Muhammad pointed out, the schedule imposed insuperable physical demands upon them. He indicated that he was physically unable to stand up under so grueling a schedule. He spoke for all of the attorneys when he pointed out to the trial judge that research upon issues presented during the trial of the case was rendered impossible.

Certainly a lawyer could not reflect upon the days' occurrences, and bring his best attention to newly arising events in the trial. He could not carry out any meaningful research into those issues. After 7:00 P.M., assuming some time to depart from the court room and confer with the client, the lawyer could find no library open to him. i.e. unless he had a complete federal library in his office, and such a circumstance is indeed rare. And then the lawyer would have to eat and loosen up - i.e. unless he was some sort of bionic man.

The court must take judicial knowledge of the fact that lawyers are not automatons; and that being so, what occurred here was clearly a destruction of the client's right to the effective assistance of counsel.

Surely the trial judge knew this to be the case; but, under the excuse that the speedy trial act over-rode all of these considerations, he persisted in maintaining the schedule he had begun, over the attorneys' objections. (See pp. 11 to 15, Appendix)

Then finally, on a Saturday, virtually one week before Christmas Eve. he instructed the jury, after 3:25 P.M. Their rapid return with guilty verdicts as against all of the defendants, on a 15 count indictment, bespeaks graphically, the jury's desire to get rid of "the case," and go home.

The trial judge had communicated his wish to swiftly determine the cause, by deliberate acts and tokens, which were far stronger than any words he might have uttered.

His calculated aim was to "obtain a conviction through the pretense of a fair trial which was in truth but used as a means of depriving the defendants of their liberty."

Had the trial judge walked into the jury room and said, "Hurry up with your verdict of guilt," there would be no difficulty apprehending what should be done here. Had there been a mob in the Court, or any other more obvious display of coercive pressure, designed to influence and speed up the jury's verdict, there would likewise be no difficulty apprehending what should be done. And, to the same extent, notwithstanding the subtlety of the trial judge's approach, he deprived the petitioner of a fair trial by subjecting all of the litigants and the jury to improper pressures aimed at coercing a judgment of guilt.

Nothing about the Speedy Trial Act, or the exigencies of the mouting volume of criminal cases, can ever justify the jettisoning of basic constitutional rights, and especially that of the right to a fair trial in a fair tribunal - in which - as Prime Minister Trudeau says, "a calm, impartial, unhurried atmosphere" must exist in order that a jury of 12 ordinary persons taken from the situs of the commission of the crime, can solemnly, and without coercion,

deliberate upon the evidence and the law affecting a given case.

Herman Schwartz, wrote in his article entitled, "Judges as Tyrants," 7 *Crim. Law Bulletin,* Mar. 1971, page 129, on page 130:

> "A judge's power does verge on the absolute. Most of what trial judges do . . . is quite unreviewable . . . And . . . even when the judicial conduct becomes so flagrant that a decision is reversed, the defendant still has to endure the tension, the expense, and the fear of punishment, that a trial produces — and all he gets is a new trial with more of the same. Thus, the existence of appellate review simply is not an adequate response to the problem."

Here, the trial judge virtually abused everyone on hand. He evinced no concern for the problems of busy trial attorneys who had to maintain offices, re-arrange other trial schedules, pay the secretary and the phone bill and the rent; keep in touch with other clients and preserve their affairs intact.

He had no decent regard for the defendants who had to silently endure his ordeal, and wonder about the effect of the procedure being employed upon their lives and fates.

He had no decent regard for the jurors, and their peace of mind, and/or personal domestic and other problems. He made no effort whatever to assure them of the time of termination of the cause, or any possible recessing of the cause to permit them to prepare for, or enjoy, the Christmas holidays. No attention was given to any possible means of ameliorating these concerns.

Rather, the jury was placed in a vice, and straight-jacket, of the court's creation, and was made aware of the court's determination to just "finish the case," and clear the docket.

Such an attitude, apart from being destructive of the atmosphere which ought to prevail in American courts, is equivalent to an instruction to the jury upon the relative unimportance of the persons on trial, and concerns, as viewed against some other, presumably more important and paramount concern. And, *nothing* should be more important to any jury, than the responsibility before them. They should not be made to think that there is any reason why the case before them should not require their most careful and considered judgment.

More and more this writer is becoming aware of the manner in which the judicial obsession with clearing dockets has acted to destroy the constitutional character of the American trial arena - in both State and Federal Courts.

Somewhere, somehow, someday, someone has to have the guts to cry, "Halt," to it all, and to walk up to, and re-define priorities. It is not up to the Courts to do the impossible, and to solve a problem not of its own creation.

Society must accept responsibility for the swelling tide of criminal cases and proceedings, and accept its role again in the whole of things. Society must once again create the atmosphere in which a calm, impartial, unhurried deliberation upon cases can be again had.

Until the People at large assume this responsibility, and provide institutions that can stem the tide of crime, courts ought to just plain stand firm on being "Courts," and preserving the Rule of Law in the criminal justice system, at the very least.

What was done in the within case, clearly deprived the defendants of a fair trial, within the meaning of the Fifth Amendment to the United States Constitution. A line should be drawn somewhere for the guidance of all participants in these proceedings; and appellate courts owe the American people a responsibility to stop apologizing for clearly inappropriate judicial action. Decisions which are not decisions upon issues of such moment, which are likely to occur again and again, do a disservice to the Criminal Justice system as a whole.

Cases are legion, where appellate courts have shown their willingness *to protect judges,* rather than the people, or *the institutions* which the judges are supposed to assist in maintaining. It is easy enough for an appellate court to pretend that there is no discernable or definable line, or point, of no return, and to validate the actions of trial judges by saying they acted within their rightful discretion; but even children know when they are doing wrong, and surely learned appellate judges, appointed for life, so that they can speak freely, do.

No body works 10 hours a day, and six days a week, even on less skillful jobs. Bus drivers, or pilots, or persons having responsibility for maintaining power lines, etc.

Neither should lawyers.

What was done in the within case clearly deprived the defendants of a fair trial, within the meaning of the Constitution. A line should be drawn somewhere. The trial had below went beyond permissible limits. It was an ordeal - and certiorari should be granted the petitioners to right what was clearly a wrong.

V.

THE NEED FOR EXPERT AURAL IDENTIFICATION TESTIMONY

In *United States* v. *Frank*, 511 F.2d 25, cca 6, 1975, n.13, the propriety of the voice print method of confirming voice identifications was passed upon with considerable reflection, viewing the leading cases on the subject, such as *U.S.* v. *Addison*, 498 F.2d 741 (D.C. Cir., 1974) (denying admission); and *U.S.* v. *Stifel*, 433 F.2d 431, 437, *cert. den.*, 401 U.S. 994, approving admission.

The case of *U.S.* v. *Baller*, 519 F.2d 463, cca 4, 1975, affirmed the spectrographic method of identification as the appropriate method.

The law review article on voice print identification, contained in the Fall 1975 issue of Vol. 13, "The American Criminal Law Review," p. 171, leans towards the admissibility of voice prints as a mode of primary voice identification.

The thrust of all these cases is away from ad hoc lay opinions of voice identifications.

Apart from that which the petitioner has written in the first part of his petition regarding the safeguards which must procedurally attend the obtaining of voice exemplars, it would seem, in light of the present posture of the law and the technology surrounding the spectrograph, that lay opinion evidence such as was used to sustain the conviction in the within case, should not be permitted to furnish an identification beyond a reasonable doubt.

Accordingly, for all of the foregoing reasons, a Writ of Certiorari should issue to the Eighth Judicial Circuit reviewing that court's judgment below.

CONCLUSION

For the foregoing reasons, the indictment against the petitioner should be dismissed, and the conviction reversed.

Respectfully submitted,

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APPENDIX

* * *

Q And, sir, you have a piece of paper in front of you. Are you referring to that?

A Yes.

Q Will you please put the paper away and testify from your recollection?

Now, where were you working your surveillance on May 13?

A I was in the area of 3219 Meyer Boulevard.

Q Did you know whose home that was?

A It was the home of Spencer Mims.

Q What time did you begin your surveillance there?

A I began my surveillance at approximately 3:25 p.m.

Q Now, what did you observe thereafter?

A I had received information from another agent over the radio that Spencer Mims —

MR. PIERCE: We object to this as hearsay.

MR. ALTO: I would agree to that, Your Honor.

Q (By Mr. Alto) Officer, without going into the information, did you receive certain information?

A Yes, sir, I did.

Q What did you observe thereafter?

A Approximately 3:30 p.m. I observed Spencer Mims exit the residence at 3219 Meyer Boulevard and enter a black over green Cadillac.

Q What time was that, sir?

A That was approximately 3:30. I am sorry, approximately 4:30 he exited the residence.

Q Did you follow him?

A Yes, sir, I did.

Q Where did he go?

A He proceeded down Meyer Boulevard, and up Paseo, and ended up at 5622 Highland, Kansas City, Missouri.

Q When he arrived at 5622 Highland Avenue, what did he do?

A He got out of his vehicle and entered the residence at that location.

Q How long did he stay in the residence?

A He was in the residence just a short while, approximately two to three minutes, maybe.

Q Then what did you see him do?

A He came out of the residence, got back into the Cadillac and left the area.

Q Did you follow him?

A I started to follow him, and then was called off.

Q Where did you go?

A I again returned to the area of 5622 Highland and began following a white, 1975 Mercury Cougar.

Q Let me ask you this: When you got back to 5622 Highland, when you first got back there, did you see anybody?

A No, sir, I didn't when I first got back there.

Q What did you do, just sit there?

A No. The surveillance was already moving at that time, and I caught up with the surveillance and began following the Cougar.

Q Did you see anybody exit the house at 5622 Highland?

A No, sir, I was unable to see anyone.

Q Where did you first pick up the Cougar?

A On Paseo; probably *in the area of 54th Street.*

Q How far is that from 5622 Highland?

A Approximately four blocks.

Q Okay. Did you follow that Cougar?

A Yes, sir, I did.

Q How many people were in the Cougar?

A Only one person in the Cougar at that time.

Q Where did you follow the Cougar to?

A The Cougar went to the area of 4033 Oak.

Q What happened there?

A When I got to the area — I had been stopped by some traffic signals, and when I got to the area I observed the white Cougar parked right in the general vicinity of 4033 Oak.

Q Did you stay on the Cougar; watch the Cougar?

A Yes, sir, I did.

Q How long did the Cougar stay there?

A The subject was there about fifteen minutes.

Q Did you see the subject leave the location?

A Yes, sir, I did observe the subject exit the residence at 4033 Oak and enter the white Cougar.

Q Do you know who the subject was?

A Yes, sir, the subject was James Jackson.

Q Did you follow him, then, when he left the Oak Street address?

A Yes, sir, I did.

Q Where did you follow him to?

A Followed him to 8707 Crystal Lane.

Q What did you know that address to be?

A That was the apartment or the address of the apartment which was being used as an undercover apartment at that time.

Q After Mr. Jackson arrived there, what did you see him do?

A I saw him park in front of the building at 8707 Crystal Lane. He exited the vehicle and entered the front door of the building at that location.

Q The person you have identified by name as Spencer Mims, do you see him here in the courtroom?

A Yes, sir, I do.

Q Would you point to him, please, and describe what he is wearing?

A He is the gentleman on the far corner in the maroon-colored suit with a maroon-and-white-colored tie.

THE COURT: The record will show that he has described this defendant.

Q (By Mr. Alto) Let me ask you this: Did you see Mr. Mims leave his residence and get in his car?

A Yes, sir, I did observe Mr. Mims come out of the residence.

Q Was he carrying any suit of clothing or any clothing with him?

A No, he was not.

Q Did you see Mr. Mims leave his car when he arrived at 5622 Highland and enter that address?

A Yes, sir, I did.

Q Was he carrying any suit or articles of clothing with him?

A No, sir, he was not.

Q The person you have identified as James Jackson, do you see him here in the courtroom?

A Yes, sir, I do.

Q Will you point to him, please, and describe what he is wearing?

A He is the gentleman in the tan-colored suit with the tan vest.

THE COURT: The record will show he has described this defendant.

Q (By Mr. Alto) Now, you last testified that you saw Mr. Jackson go in 8707 Crystal Lane. Did you stay there at the undercover apartment?

A Yes, sir, I did. I maintained surveillance at that location.

MR. ALTO: At the present time, I have no further questions, Your Honor.

THE COURT: Cross-examination.

CROSS-EXAMINATION BY MR. RUSSELL:

Q Officer Searcy, on this date of May 13, how long had you been involved in this particular investigation?

A Approximately one month, I would say.

Q Had you been involved in other surveillances of homes?

A Yes, I had been assisting in other surveillances.

Q Had you followed Mr. Jackson prior to that date?

A Yes, sir, I had.

Q Can you tell me, on May 13, 1975, what was Mr. Jackson wearing?

A I believe he had on a tan suit and white hat at that time.

Q You mean a suit like what he is wearing today?

A Something similar; more of a leisure-type suit.

Q Would you refer to that tan suit as a brown suit?

A It is brown, tan; yes, sir, I would say.

Q And so you had seen him on occasion wearing a brown suit or tan-type suit?

A Yes.

Q It may have been a different style than the suit he has on today; is that right?

A Very possibly.

Q So he has more than one brown suit, if I can throw it into that category?

A I couldn't testify as to whether he does have more or not; he could possibly.

Q You have seen him in more than one?

A I am not certain whether the suit he has on is exactly the same one or not.

Q Okay. You indicated that you were actually following Mr. Mims and you didn't see Mr. Jackson come in and out of his house; is that right?

A Not at the area of 5622 Highland.

Q *So, to your personal knowledge, you don't know whether the contact was ever made between Mr. Mims and Mr. Jackson; is that right?*

A *Not to my own personal knowledge.*

Q You didn't see them together or hear them talking together or see them make any kind of transfers or have any conversation; is that right?

A No, sir, I didn't.

Q Now, you said you saw Mr. Jackson go to 8707 Crystal

* * *

I knew — where I didn't personally make a recording, but I did know it was your client, yes.

Q Where you knew? You mean someone told you they knew it was my client?

A Both. Someone would tell me plus I would know when I listened.

Q Do you get any differences between one wiretap in the quality which would change the sound of the voice?

A Not change the sound of the voice. There would be variance in the quality of the tapes.

Q But as far as you know — I think there are four individual wire interceptions from one on the other. Every time one is intercepted they sound the same over the wire intercepts?

A To the best of my knowledge, the person would sound the same, yes.

MR. WILLIAMS: Thank you.

THE COURT: Mr. Vaughan, you said something about having heard someone in court. Which one?

THE WITNESS: Well, I have heard Mr. Jackson in court. I have heard Mr. Mims in court, and I have heard Mr. Jardan in court.

THE COURT: For how long a period of time have you heard them?

THE WITNESS: It was a brief period of time during the motion hearings.

THE COURT: Any further questions, gentlemen?

RECROSS-EXAMINATION BY MR. PIERCE:

Q I take it from your answer that that exposure, in and of itself, would not allow you to identify anyone's particular voice; is that correct?

A Would you ask the question again?

Q Surely. In respect to the court proceedings that you have just talked about, having had exposure to any particular voice from ten to fifteen minutes in your expertise of having done this before, that would not be enough, in your opinion, would it, to be able to clearly identify that voice when you heard it again?

A If the only time I had ever heard it — for example, Mr. Jackson's voice — was the time that I heard him in court and I had never talked to him or listened to him on the phone, it would probably be more difficult.

MR. PIERCE: I understand. Thank you, sir.

MR. RUSSELL: Mr. Vaughan, I take it, since this is the first time you have testified in this regard, you have no formal training in making voice comparisons, voice prints?

THE WITNESS: No, sir, I have had no formal training.

MR. RUSSELL: Thank you.

MR. PIERCE: Just one more question. Would you

* * *

is that the things that we normally will be discussing in those conferences has nothing at all to do with your function as the jury in the case.

So, please, simply regard those conferences as a necessary, usual and customary part of any trial and disregard them.

If anything should arise during those conferences that touches on your function as jurors you may be assured I will tell you all about it at that time. Otherwise, as I say, simply disregard those conferences as necessary and routine.

There may be a time or two during the trial of this case when I think it will be helpful to you if I give you some further instructions, and if such an occasion should arise I will do that.

I believe, then, with that very brief statement of it, plus my reminder to you that the hours we will plan on keeping in this case are that we will be in the trial of this case from approximately 9:15 each day until approximately 7:00 P.M. each day except for Saturday. On Saturday we will start at approximately 9:15 in the morning and we will stop at approximately 5:00 P.M. Saturday afternoon.

I know that you folks are prevented from going about your ordinary functions and duties so we are going

* * *

There are two Jacksons in this case, as you well know. There are five defendants in this case. And it was only after your man was thoroughly described where there could be no mistake, and you know there is no mistake, that I simply asked him to rise and sit down so the jury can begin to put these people together in their minds.

If you think that is error, so be it. I do not. And if I ask one of them to rise, don't tell him not to.

MR. HOLLIDAY: I have one other motion.

THE COURT: Yes, sir. You have two more minutes. We will take the rest of them up at the noon recess.

MR. HOLLIDAY: I want to, at this time, move that the trial schedule of this case be revised. I base that on the announced trial schedule that we will be here from Mondays through Saturdays from 9:00 to 7:00.

THE COURT: 9:15 to 7:00.

MR. HOLLIDAY: A period of ten hours per day. I say that these defendants are entitled to time to confer with counsel. Counsel is entitled to time to do some research and counsel is also entitled to some time to go home and rest, as well as some time to visit with their friends and family.

I say that it has been recognized in this country, at least since the administration of Franklin Roosevelt, that forty hours a week was a normal work week for an ordinary person. I call the Court's attention to the fact that I, for one, am fifty-seven years old. Other counsel in this case may not be as old, but also have some physical problems. I, for one, suffer from high blood pressure, as most people do when they get fifty-seven years old.

I think it is an undue strain upon me, an undue strain on counsel, an undue strain on the defendants. We have no way of knowing how long this case will last, and I will say this, Your Honor, that defendant Nathaniel Muhammad intends to put on extensive evidence in this case, and I don't know how long defendant Muhammad's evidence is going to last. I say that it is an unfair burden and it makes it most difficult, if not impossible, for these defendants to receive a fair trial when they are required to remain in the courtroom ten hours a day, six days a week, without any opportunity to confer with counsel and without their counsel having any opportunity to research some of these questions.

I come from a little, three-man firm. Many others here are single practitioners. No one on this case representing the defendants has any extensive number of people working with

them. The United States, on the other hand, has God knows, I don't know how many attorneys or people, or other people they can call upon to help them.

We noticed, for instance, yesterday that Mr. Tetrick walked into the courtroom and handed Mr. Alto a brief which had been prepared. We have no such facilities as those. And in addition to that, the United States, Your Honor, has been working on this case since January. We came into the case in September when the indictment was filed. The Court gave us until the first day of December to be ready to go to trial.

It has utilized all of the resources that we have, certainly utilized all the resources I have, in order to be prepared to go to trial in such a short period of time on a case which has taken the Government so long to prepare.

We are not complaining about the fact that we are having a speedy trial, because this is required, but we are complaining about the fact of the schedule which the Court has set. And the justification for the schedule, Judge, is the thing, when you compare it in terms of the rights of the defendants, cannot stand.

What is the justification? Expediency? Time? Money? What does money have to do when it comes to dispensing justice? What does time have to do in comparison with the rights of these defendants? It is an entirely unreasonable thing, and, really, Judge, I have never in my twenty-five years of practice, I have never known of an occasion where a judge has so arbitrarily set such a schedule as this.

THE COURT: Well, you just may not be conversant with what the judges now do. First of all, you have not asked for a continuance. Secondly, at an earlier time, you did tell me you had commenced some preparation even before the indictment. Third, no one in this case has, as of yet, although you have made these overly broad charges and assertations, has requested of me for any time to have a private consultation with their client. Nobody has asked for an hour's continuance, minute's continuance, or anything else.

We have had only one day of trial, and that did not start until 2:00 o'clock in the afternoon and ended at 7:00. That was yesterday.

I do intend to follow the schedule of having my jury here at 9:15 each morning and trying to get started by 9:30 each morning and run until approximately 7:00 each evening. I do intend to have the usual and customary recesses that one would have. I do intend to grant emergency recesses. I do intend to grant some time continuances if anybody makes a special request for them and can tell me why they need it. I will be very fair about that, or at least as fair as I can.

Up to now, I have had no such requests. I have made no denials. Several times during the voir dire of this jury, although nobody else asked it, at the time you suggested your client needed to go to the bathroom, and we simply took recesses at that time. But because I have to be responsible for the jury, I forewent any recess and sat through the entire period without leaving the courtroom.

I am following the same schedule you all are plus, because, believe me, while this case is moving, the other 650 cases I have on my docket from time to time have to have some emergency attention. While you gentlemen were sleeping yesterday, I was down here taking changes of pleas and doing other matters so I could start promptly on this case at 2:00 p.m.

So there is no problem about it. This is not the first week I have ever worked or planned to work a six-day week. It is customary. I work that much. If you knew the overwhelming volume of federal cases that we have, all of which must be properly processed or the whole system would fall down, you would have a little better understanding.

There is nothing special about this case with me. It is just another case. It is going to receive the usual treatment that any case receives. It is going to get the appropriate considerations when timely requests are made. There is nothing different about it at all. I work practically every Saturday in the fall and wintertime, with the exception of, perhaps, three or four times

when I manage to see a football game. I work every Saturday, and it is not unusual for me to have a jury down here on Saturday; nothing at all.

So, gentlemen, your complaints, insofar as I am concerned, that this case is being treated differently, my

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1093
No. 76-1094
No. 76-1095
No. 76-1105
No. 76-1112

United States of America, Appellee,	*	
v.	*	Appeal from the United States District Court for the Western District of Missouri.
James Jackson, Harold Hudson, Lushrie Jardan, Spencer Mims, and Nathaniel Muhammad, Appellants.	*	

Submitted: October 11, 1976

Filed: February 8, 1977

Before GIBSON, Chief Judge, HEANEY and WEBSTER, Circuit Judges.

GIBSON, Chief Judge.

This case involves a major drug distribution scheme centered in Kansas City, Missouri. In September, 1975, a fifteen count indictment was returned against James Jackson, Nathaniel Muhammad, Lushrie Jardan, Harold Hudson,

Spencer Mims and Juan Pablo Garcia,[1] charging a conspiracy to distribute heroin and cocaine and to possess heroin and cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846. In addition to the single count of conspiracy, Jackson was also charged with ten substantive counts alleging distribution of heroin or cocaine in violation of 21 U.S.C. §841(a)(1) and with three counts alleging distribution of heroin in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2.[2] Muhammad and Mims were each charged with two substantive counts of unlawful distribution of heroin in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. Hudson was charged only with conspiracy, as was Juan Pablo Garcia, who pled guilty prior to trial. The remaining five defendants, appellants here, were tried jointly and convicted as charged after an extensive jury trial.

The evidence portrays a well organized illegal conspiracy for the sale and distribution of controlled substances extending at least from early January, 1975 until July 23, 1975. Probative evidence of at least 61 overt acts, thirteen of which constituted substantive violations of federal narcotics law, was presented to the jury. Starting on March 7, 1975, Jackson made a series of seventeen sales of heroin or cocaine to federal agents or informants. Fifteen of these sales were

[1]We note, because defendants make constant reference to the fact in their briefs, that all defendants except Garcia are members of the Nation of Islam, commonly known as the Black Muslim faith. Muhammad serves as the local leader of this faith in the Kansas City area. Jackson was, at least prior to his arrest, a Captain of Security for the Temple of Islam. Mims was one of Muhammad's assistant ministers and a Supervising Captain in the Black Muslim hierarchy. Hudson and Jardan subscribe to the Black Muslim faith, but apparently did not figure in the upper echelons of the religious organization prior to their arrests.

[2]Count II of the indictment charged Jackson with the alleged distribution of cocaine to a person under twenty-one years of age in violation of 21 U.S.C. §§841(a)(1) and 845. That count was not submitted to the jury, however, and was dismissed by the trial court, the Honorable Elmo B. Hunter, United States District Judge for the Western District of Missouri.

made to Harold T. Vaughan, a special agent for the Drug Enforcement Administration (DEA). Jackson was the sole conspirator present at these illegal sales. His conduct during the course of the conspiracy, however, established a salient pattern of frequent contacts with Muhammad, particularly during negotiations for sales of narcotics and before and after these sales. On May 9, 1975, for example, Jackson visited Muhammad's residence both before and immediately after a sale of three ounces of heroin to Agent Vaughan. On both May 13 and May 31, Jackson went directly to Muhammad's residence following two sales of $1,800 worth of heroin each. On June 5, 1975, Jackson bifurcated a sale of seven ounces of heroin by first delivering five ounces to Agent Vaughan, then meeting with Muhammad and Mims, and finally returning to Vaughan with the remaining two ounces. Jackson visited Muhammad's residence immediately after completing the second part of the sale. On June 13, Jackson proceeded from a sale of twelve grams of cocaine directly to Muhammad's residence. On June 30, after Jackson sold 50 grams of heroin to Vaughan for $3,000 and boasted of "his man's" ability to bring a large quantity of 80% pure heroin to Kansas City, he immediately drove to Muhammad's residence. On July 9, Jackson went directly from Muhammad's residence to Vaughan's apartment, where a sale of 26 grams of heroin was made, and then returned to Muhammad's residence by a circuitous route. When, on July 11, Vaughan paid Jackson the balance of $1,300 due on the July 9 purchase, Jackson proceeded straight to Muhammad's residence. Finally, on July 23, Muhammad met with Jackson at Jackson's residence prior to Jackson's sale of thirteen grams of heroin to Vaughan for $1,600. Following this sale, Jackson drove to Muhammad's residence. When Muhammad was arrested on July 23, agents discovered on his person $1,000 in bills with pre-recorded serial numbers which had been given by Vaughan to Jackson for the thirteen grams of heroin. When Jackson was arrested on that same day, the remaining $600 in bills with pre-recorded serial numbers was recovered from him.

Court-approved wiretaps of the telephones of Jackson, Mims and Jardan produced evidence of various conversations between Jackson and Mims and between Mims and Jardan which were interpreted by federal agents to relate to sales of narcotics. Mims, Jardan and Hudson were participants in an arrangement with Garcia which involved the purchase of a large amount of heroin. Mims and Jardan traveled to El Paso, Texas, on June 14, 1975, where they obtained approximately one kilogram of brown heroin from Garcia, a citizen of Mexico. Although they paid Garcia only $7,000 of the $40,000 purchase price, he allowed them to take the heroin back to Kansas City, on the understanding that Jardan would quickly acquire the additional money, return to El Paso and pay Garcia in full. After a fruitless three day wait in El Paso, Garcia telephoned Jardan, who quibbled over the quality of the heroin and sought to obtain a lower price. It was agreed that the heroin would be returned to Garcia by a man with a missing finger, defendant Hudson. On June 17, Hudson delivered a package to Garcia in El Paso, which was short approximately one-quarter kilo. Hudson stated that he "really [didn't] know anything about that," but called Jardan, talked to him and then allowed Garcia to talk to him. Eventually Jardan and Garcia reached a new agreement for the purchase of twenty ounces of the heroin. They were arrested on July 10, 1975 in New Orleans, Louisiana, where they were meeting to consummate the first step of the new deal. A search of Garcia's hand luggage following his arrest revealed twenty ounces of heroin.

Defendants' joint jury trial commenced on December 1, 1975, and ended on December 13, 1975, with their convictions on all charges. All defendants appeal.

I

Muhammad, Mims and Jackson challenge the validity of the voir dire examination conducted by the trial court. They

contend that this case was "unusually sensitive" because of its concurrent racial and religious aspects and that a "most searching and most thorough" examination of jurors was, accordingly, required in order to reveal prejudice. It is defendants' position that the only adequate means of voir dire examination under the circumstances of this case would have been an in camera questioning of individual veniremen by defense attorneys.

All defendants requested permission to conduct voir dire examination themselves, assisted by experts. Muhammad filed a written pretrial motion requesting in camera voir dire by defense counsel. An evidentiary hearing was held at which defendants presented expert testimony on the question of racial prejudice. The trial court subsequently overruled defendants' motions and determined that it would adhere to the usual practice in the Western District of Missouri and conduct the voir dire examination itself. The trial court solicited initial and follow-up questions from defense counsel. Counsel for Jardan and Muhammad proffered and the court considered a total of 252 voir dire questions. The court also announced its willingness to question jurors individually and in camera where general questioning revealed that a particular venireman might be prejudiced.

The form and scope of voir dire examination are matters left to the broad discretion of the trial court. *Hamling v. United States*, 418 U.S. 87 (1974); *United States v. Cosby*, 529 F.2d 143, 147 (8th Cir.), *cert. denied*, ____ U.S. ____ (1976); Fed. R. Crim. P. 24(a). The trial court here asked most of the approximately 250 questions submitted by defendants, many of which went to the issues of racial prejudice and exposure to pretrial publicity. Where general questioning revealed potential prejudice, follow-up questioning of individual veniremen was conducted by the trial court in camera. Examination was particularly penetrating with regard to the sensitive issues of exposure to pretrial publicity and racial prejudice. *See Ham v. South Carolina*, 409 U.S. 524 (1973); *United States v. Crow Dog*, 532 F.2d 1182, 1198 (8th

Cir. 1976), *petition for cert. filed*, 44 U.S.L.W. 3749 (U.S. June 21, 1976) (No. 75-1843); *United States v. Bear Runner*, 502 F.2d 908 (8th Cir. 1974). A review of the record shows that the trial court's voir dire examination combined careful attention to the identification of possible prejudice with skillful avoidance of the confusion and delay that may arise when a jury is selected in a multiple defendant case where there is the potential of conflicting defenses. We conclude that the trial court did not abuse its discretion in its conduct of the voir dire examination.[3]

II

Many contentions raised on this appeal relate to the question of whether defendants were so prejudiced by the joint trial as to require severance. Defendants were joined pursuant to Fed. R. Crim. P. 8 and the propriety of this initial joinder has not been contested. Rather, each defendant

[3] In the designation of issues on appeal, defendants also challenge the validity of jury selection. They contend that the Government's striking of several blacks from the jury panel was part of a systematic practice by the Government to strike blacks from juries in the Western District of Missouri. An identical contention was raised in *United States v. Carter*, 528 F.2d 844, 848 (8th Cir. 1975), *cert. denied*, ____U.S. ____(1976), concerning the Government's use of jury strikes in the Western District of Missouri in 1974. The court in *Carter* found that the defendant had failed to establish that the Government's use of jury strikes in the Western District of Missouri in 1974 constituted an impermissible practice under *Swain v. Alabama*, 380 U.S. 202 (1965). In the instant case, a post-trial hearing was held on this issue. The trial court determined that the evidence there presented failed to show any systematic practice on the Government's part of striking blacks from jury panels in the Western District of Missouri in 1973, 1974 or 1975. The court further found that there was no systematic or arbitrary striking of blacks from the jury panel from which the jury in this case was selected. Nothing defendants have presented on appeal convinces us that the trial court's resolution of this issue did not rest on a firm factual and legal basis.

contends that although the initial joinder was proper, prejudice resulted thereform during the joint trial, mandating a severance under Fed. R. Crim. P. 14.

It is the general rule that persons charged in a conspiracy should be tried together, particularly where proof of the charges against the defendants is based upon the same evidence and acts. *United States v. Kirk*, 534 F.2d 1262, 1269 (8th Cir. 1976); *United States v. Hutchinson*, 488 F.2d 484, 492 (8th Cir. 1973), *cert. denied*, 417 U.S. 915 (1974); *United States v. Kahn*, 381 F.2d 824, 838 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967). Severance will be allowed upon a showing of real prejudice to an individual defendant. *United States v. Hutchinson, supra*, at 492. However, the motion to sever is addressed to the discretion of the trial court, *Williams v. United States*, 416 F.2d 1064 (8th Cir. 1969), and a denial of severance is not grounds for reversal unless clear prejudice and an abuse of discretion are shown. *Johnson v. United States*, 356 F.2d 680 (8th Cir.), *cert. denied*, 385 U.S. 857 (1966). A defendant must show something more than the mere fact that his chances for acquittal would have been better had he been tried separately. *Williams v. United States, supra* at 1070. He must "affirmatively demonstrate that the joint trial prejudiced [his] right to a fair trial." *Golliher v. United States*, 362 F.2d 594, 603 (8th Cir. 1966). Thus, before the refusal to sever may be deemed an abuse of discretion on the part of the trial court, prejudice to a defendant's right to a fair trial must be established. Relying upon these principles, we now turn to defendants' numerous severance claims.

Muhammad contends that the denial of his motion for severance deprived him of the exonerating testimony of his co-defendants. At a pretrial evidentiary hearing, each of Muhammad's four co-defendants testified that he had information that might exonerate Muhammad and that he would be willing to give that information at trial so long as no waiver of his Fifth Amendment rights was required. At the

hearing, each co-defendant then exercised his Fifth Amendment privilege and refused to divulge the nature of this allegedly exculpatory information. The trial court declined to sever Muhammad from the forthcoming trial on this basis.

At trial, Jackson and Jardan chose to testify on Muhammad's behalf. Hudson and Mims expressed to the trial court their intention to exercise their Fifth Amendment privileges if called and they were not, therefore, called at trial to testify on Muhammad's behalf. Muhammad argues that the denial of his severance motion caused Hudson and Mims not to testify in his favor and that this denial prejudiced his right to a fair trial.

At the pretrial hearing, Muhammad supported his motion for severance solely by the statements of his co-defendants that they had or believed that they had information "which may tend to exonerate" Muhammad. No details of the nature, extent or materiality of this purportedly exculpatory evidence were placed before the trial court. Nor did any of the co-defendants, who had affirmatively stated an unwillingness to waive their Fifth Amendment rights, specifically express a willingness to testify in the event Muhammad was tried separately. Severance of Muhammad would not automatically have created an environment in which his co-defendants could have testified without waiving their Fifth Amendment rights. If Muhammad had been severed and tried first, his co-defendants would have had to waive their Fifth Amendment rights in order to testify on his behalf. *United States v. Carella*, 411 F.2d 729, 731 (2d Cir.), *cert. denied*, 396 U.S. 860 (1969). Thus, the co-defendants' pretrial stance, that they would not waive their Fifth Amendment rights at the forthcoming joint trial, could not be considered equivalent to assurances that they would testify for Muhammad at a separate trial.

The trial court was, accordingly, asked to take the extreme step of severing Muhammad without any knowledge of the nature or extent of purportedly exculpatory evidence and without any indications that co-defendants would in fact be

willing to offer such evidence in the event of severance. The bald and conclusory assertions of Muhammad's co-defendants that they possessed potentially exculpatory evidence did not provide adequate grounds for pretrial severance in this multi-defendant trial. The trial court did not abuse its discretion in refusing to grant Muhammad's motion for severance.[4]

The fact that two co-defendants chose to testify on Muhammad's behalf at trial serves to vitiate any claim of prejudice on his part as well as to highlight the purely speculative nature of the basis on which the trial court was asked to grant a severance. Despite their pretrial posture, that they would only exonerate Muhammad if they could do so without waiving their Fifth Amendment rights, Jardan and Jackson, the central figure in this case, offered allegedly exculpatory evidence for Muhammad at trial. Hudson and Mims chose not to so testify, and prior to trial the court was offered no reason to believe that they would testify in the

[4] We note that where an appropriate record concerning the exculpatory evidence that would be available from a co-defendant in the event of separate trials has been offered, some courts have isolated certain circumstances under which severance is deemed obligatory. *United States v. Sica*, 20 Crim. L. Rep. (BNA) 2170 (3d Cir. Oct. 20, 1976); *United States v. Martinez*, 486 F.2d 15 (5th Cir. 1973); *United States v. Shuford*, 454 F.2d 772 (4th Cir. 1971); *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970); *United States v. Echeles*, 352 F.2d 892 (7th Cir. 1965). Where, as here, the record has simply shown an unsupported contention that severance could result in exculpatory testimony of a co-defendant, courts have consistently declined to grant severance. *United States v. Evans*, 526 F.2d 701 (5th cir.), *cert. denied*, ____ U.S. ____ (1976); *United States v. Ellsworth*, 481 F.2d 864 (9th Cir.), *cert. denied*, 414 U.S. 1041 (1973); *United States v. Nakaladski*, 481 F.2d 289 (5th cir.), *cert. denied*, 414 U.S. 1064 (1973); *United States v. Kilgore*, 403 F.2d 627 (4th Cir. 1968), *cert. denied*, 394 U.S. 932 (1969); *United States v. Kahn*, 381 F.2d 824 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967); *United States v. Kahn*, 366 F.2d 259 (2d Cir.), *cert. denied*, 385 U.S. 948 (1966); *United States v. Fluellen*, 396 F. Supp. 1168 (E.D. Pa. 1975), *aff'd*, 530 F.2d 965 (3rd Cir. 1976).

event of separate trials, for a grant of separate trials would not necessarily have allowed Mims and Hudson to testify for Muhammad without foregoing their Fifth Amendment rights. *United States v. Carella, supra* at 731; *United States v. Frazier*, 394 F.2d 258, 261 (4th Cir. 1968). While it is impossible to ascertain the nature of the evidence that Mims and Hudson[5] might have offered, we note that this is not a case where refusal to sever denied a defendant all potentially exculpatory evidence or the only means of attacking or countering a crucial aspect of the Government's case. Thus, the record does not support a finding that severance was mandated prior to trial or that denial of severance utlimately prejudiced Muhammad at trial.

Muhammad, Mims, Jardan and Hudson contend that the overwhelming evidence of Jackson's guilt overflowed prejudicially onto them and resulted in convictions based upon their assocation with him during the joint trial.[6] The preference for joint trials of defendants jointly indicted, particularly where conspiracy is charged, *United States v. Hutchinson, supra* at 492, is not limited by any requirement that the quantum of evidence of each defendant's culpability

[5]The value of any allegedly exculpatory evidence that Hudson could have offered is questionable in light of the fact that the Government's evidence did not connect Hudson directly to Muhammad in the criminal scheme.

[6]In conjunction with this contention, defendants make the bare and unsupported allegation that severance was necessary because of their reliance on inconsistent defenses. In order to demonstrate an abuse of discretion, defendants must show more than the fact that co-defendants whose strategies were generally antagonistic were tried together. *United States v. Robinson*, 432 F.2d 1348 (D.C. Cir. 1970). All that the defendants here have shown is that each defendant relied on general denial, except for Jackson, who claimed entrapment. The reliance of only one of several co-defendants on an entrapment defense does not establish a right to a severance. *United States v. Eastwood*, 489 F.2d 818 (5th Cir. 1973). The trial court did not abuse its discretion in refusing to sever on the basis of inconsistent defenses.

be equal. It is indeed hard to imagine a multiple defendant case in which the evidence against individual defendants is either quantitatively or qualitatively equivalent. A defendant is not entitled to severance merely because the evidence against a co-defendant is more damaging than the evidence against him. *United States v. DeLarosa*, 450 F.2d 1057, 1065 (3d Cir. 1971), *cert. denied*, 405 U.S. 927 (1972). Severance becomes necessary where the proof is such that a jury could not be expected to compartmentalize the evidence as it relates to separate defendants. *United States v. DeLarosa, supra* at 1065.

A review of the record does not persuade us that this situation existed in the present case. Jackson was charged with a greater number of substantive offenses than were his co-defendants. Because the Government undertook to establish his complicity by showing his participation in this greater number of offenses, there was necessarily more evidence adduced against Jackson that against his co-defendants. The presentation of more evidence applicable to one defendant than to his co-defendants is simply a fact of life in multiple defendant cases. The greater amount of evidence introduced against Jackson here was not far more damaging than the evidence relating to his co-defendants, but only more from a quantitative standpoint. The quantitative inequality of evidence adduced provides no ground for a severance. Nor does the record support a finding that the evidence presented at trial was of such a nature that the jury could not compartmentalize it to the particular defendant or defendants to whom it was applicable. The cases cited by defendants in support of this contention are largely inapposite, for they involve the peculiar circumstance, not present here, where evidence at a joint trial shows that two or more groups of individuals have participated in a number of separate and distinct conspiracies. *Kotteakos v. United States*, 328 U.S. 750 (1946); *United States v. Butler*, 494 F.2d 1246 (10th Cir. 1974); *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969).

The Government's method of presenting its evidence, discussed below, served to carefully delineate separate events and occurrences and thus to protect against confusion by the jury as to the applicability of any given evidence to a particular defendant. Each defendant was represented by his own counsel. The limited applicability of evidence adduced to individual defendants was clearly explained to the jury during the progress of the trial. Moreover, a review of the jury instructions shows that the jury was carefully instructed in a manner that protected defendants from any improper overflow of evidence from one to another and there is nothing in the record indicating that the jury was confused or failed to follow the court's instructions.

Jackson, Jardan, Mims and Hudson contend that they were prejudiced by the security measures in effect during the trial which, they argue, would have been unnecessary had their motions for severance been granted. It is their allegation that the jury was constantly exposed to "extraordinary security measures" throughout the trial and that this exposure created in the jury a misimpression that defendants were dangerous individuals. Defendants rely upon the principle that the fundamental presumption of innocence may be weakened when a criminal defendant is not clothed with the physical indicia of innocence at trial. *Kennedy v. Cardwell*, 487 F.2d 101 (6th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974). Thus, where, as here, maximum security measures are taken during a particular trial, it may be necessary to determine whether these measures denied defendants the right to a fair trial by depriving them of the physical indicia of innocence.

The security measures utilized at trial included the presence of five plain clothes United States Marshals in the courtroom, the posting of several Marshals outside the front doors of the courtroom and the use of an electronic metal detecting device on all spectators entering the courtroom.[7] We note initially

[7]These measures were undertaken pursuant to a general order of the District Court en banc filed on July 30, 1975, which required maximum security in any case that was likely to be widely publicized and thus attended by many persons and curiosity seekers, some of whom might be inclined to cause disruption.

that under the circumstances of this case, where three of five defendants were incarcerated during trial, several Government witnesses were in state of federal custody and a large number of spectators were constantly in attendance, these measures were neither undue, *United States v. Howell*, 514 F.2d 710, 715 (5th Cir.), *cert. denied*, 423 U.S. 914 (1975), nor beyond the sound discretion of the trial court. *Gregory v. United States*, 365 F.2d 203, 205 (8th Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967). Furthermore, a review of the record shows the crux of defendants' contention, that the jury was constantly exposed to these measures, to be unfounded. To the contrary, it is clear that the jury was carefully shielded from contact with or awareness of the security measures in effect during the course of the trial. Aside from the security measures to which all veniremen were exposed when they arrived at the courthouse on December 1, 1975, the jury was not exposed to any security measures other than those normally utilized in a case where the jury is sequestered.[8] Thus, not only were the security measures utilized here appropriate under the circumstances and well within the discretion of the trial court, *Gregory v. United States, supra* at 205, but they were implemented in a manner which did

[8]The jurors entered and left both the courthouse and courtroom through back entrances, thus avoiding contact with the security measures in effect at the entrances to the building and courtroom. The United States Marshals in the courtroom were nonuniformed.

not deprive defendants of the physical indicia of innocence to which they were entitled.[9]

Mims, Jardan, Jackson and Hudson contend that they should have been granted separate trials because of the prejudice they suffered in the eyes of the largely Christian jury as a result of the introduction into evidence by Muhammad of a video-tape critical of Christians. A major part of Muhammad's defense consisted of evidence of his public opposition, as a religious leader, to the use of narcotics. As part of this evidence, videotaped excerpts of five of Muhammad's sermons were played for the jury. Prior to their introduction, Muhammad's counsel advised the court that the tapes in question related to Muhammad's position on narcotics and a witness who had chosen the tapes testified that this was their subject matter.

On the fifth tape played, Muhammad denounced Christians as sinners and hypocrites. At the conclusion of this tape, counsel for Mims moved for a mistrial on the grounds that the content of the tape had offended the jury, composed mostly of Christians, and thus prejudiced his client. The trial court immediately charged the jury that the last tape was irrelevant to any issue in the case and instructed that it be

[9]It was alleged by Jardan for the first time at a post-trial hearing that a woman juror had seen defendants in jail garb and handcuffs in the courthouse parking lot as some point during the course of the trial. Questioning revealed that Jardan was not sure whether the woman was a juror or security person. Moreover, none of Jardan's co-defendant's corroborated his allegation and it was not brought to the trial court's attention until after the conclusion of the trial. Assuming *arguendo* that one member of the jury was exposed to a glimpse of the defendants in jail uniforms and handcuffs and that this incident is now cognizable on appeal, we find that no prejudice has been shown to have resulted. *United States v. Leach*, 429 F.2d 956, 962 (8th Cir. 1970), *cert. denied*, 402 U.S. 986 (1971). Unlike the situation where a defendant is tried in jail garb, *Estelle v. Williams*, 425 U.S. 501 (1976), far less danger of prejudice inheres in a situation where a juror's vision of a defendant in jail uniform is fleeting and outside the courtroom.

disregarded. After a short recess, the court again instructed the jury to disregard the last tape, stating that the tape had been offered by Muhammad alone "and not by anyone else."

The playing of this videotape interjected a brief but unfortunate interlude of irrelevance into the trial. We note, as did the trial court, that there was no reference in the anti-Christian tape to Muhammad's co-defendants or any indication that they personally endorsed the views expressed in the sermon. We are convinced that the trial court's immediate and firm curative instructions served to prevent any prejudicial effect on Muhammad's co-defendants.[10]

Mims, Jardan and Hudson moved for continuances on December 1, 1975, the date set for the commencement of trial. Muhammad and Jackson, who were satisfied with the trial date, did not join in the motion. Mims, Jardan and Hudson contend that the defendants' disparate positions on the desirability of a continuance mandated severances. We find this contention to be lacking in merit. A motion for a continuance is addressed to the sound discretion of the trial court. *United States v. Webb*, 533 F.2d 391, 395 (8th Cir. 1976); *Kansas City Star Co. v. United States*, 240 F.2d 643, 651 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957). A review of the record shows that the trial court did not abuse its discretion in denying the motion for continuance.

[10]Closely allied to defendants' contentions concerning the anti-Christian videotape are allegations that severance should have been granted because Muhammad's co-defendants were prejudiced by the religious "undertones" of the trial. It appears that defendants base this contention on an assumption, unsupported by any evidence, that the Black Muslim faith is so unpopular that to be associated with it is automatically prejudicial. Even if we assume *arguendo* that the present trial was pervaded by religious "undertones" and that the Black Muslim faith is unpopular, defendants have failed to show that the trial court abused its discretion in refusing to grant motions for severance on this basis. The unfavorable impression created by a defendant's identification with an unpopular group does not require severance. *United States v. DeLarosa*, 450 F.2d 1057, 1065 (3d Cir. 1971), *cert. denied*, 405 U.S. 927 (1972).

All defendants contend that the manner in which the testimony of Special Agent Vaughan was elicited at trial prejudiced them to a degree requiring reversal.[11] Agent Vaughan was a key Government witness, who was personally involved in many of the narcotics sales at issue. Rather than placing Agent Vaughan on the witness stand only once, the Government proposed to the trial court a presentation of Agent Vaughan's testimony whereby he would be recalled from time to time in order to testify about individual transactions in chronological order. Despite defendants' objections, the trial court agreed to permit Agent Vaughan to be recalled a number of times to testify chronologically. A special system of cross-examination was devised by the trial court to insure that the defendants' rights under the Sixth Amendment would not be diminished in any way by this somewhat novel presentation of evidence. After each appearance, Agent Vaughan was subject to cross-examination on the subject matter of that appearance as well as to cross-examination on the issue of credibility. On his final appearance, Agent Vaughan was subject to full cross-examination covering all his trial testimony. Thus, the chronological presentation of Agent Vaughan's testimony provided each defendant with numerous opportunities for cross-examination as to both credibility and the subject matter of his testimony.

The mode and order of interrogation and presentation of evidence are matters placed within the discretion of the trial court. *Brinlee v. United States*, 496 F.2d 351, 355 (8th Cir.), *cert. denied*, 419 U.S. 878 (1974); Fed. R. Ev. 611(a). A review of the record shows that the manner in which Agent Vaughan was called to testify lent a praiseworthy degree of

[11]Hudson and Jardan raise this contention as an aspect of their severance contention. Mims, Muhammad and Jackson do not tie their claim of prejudice on this basis to the severance issue. Whether the matter of Vaughan's testimony is deemed an aspect of trial management or a part of the question of severance, it must be analyzed in terms of its impact on defendants' rights to a fair trial.

order to this complicated trial. Clearly, a desire for the orderly presentation of evidence does not outweigh a defendant's right to a fair trial. We find nothing in the record to indicate, however, that the chronological presentation of Agent Vaughan's testimony diminished defendants' rights to cross-examination or prejudiced their rights to a fair trial in any way. The trial court carefully exercised its discretion in managing the presentation of Vaughan's testimony in such a way as to fully protect defendants' rights.[12] There was no abuse of discretion in permitting the Government to present its evidence chronologically through the repeated recall of Agent Vaughan as a witness. In fact, this procedure is commended as one way to clearly present an organized factual recital in an extended conspiracy trial.

Hudson, Jardan and Mims contend that severance should have been granted because of the prejudice they suffered as a result of heated colloquy between counsel for Muhammad and Jackson and the prosecutor. The record does reveal a certain, not uncommon, amount of professional enmity between counsel for Muhammad and Jackson and Government counsel. The purportedly prejudicial colloquy cited by defendants as grounds for severance did not occur within the hearing of the jury, however, for in its management of the trial the court required that objections be made at the bench and out of the hearing of the jury. The court was indeed so careful to protect the jury from exposure to colloquy between counsel that the jury was excused for a brief recess during an objection by Government counsel to defense cross-examination of Agent Vaughan. Contrary to defendants' contentions, the jury was not exposed to heated colloquy between Muhammad's and Jackson's counsel and the

[12]The court was attuned to the danger that Agent Vaughan's testimony could become so piecemeal as to confuse rather than clarify matters. Thus, when on one occasion the Government proposed to recall Vaughan several times to establish a single transaction, the court required a consolidation of all his testimony with respect to a given date and count.

prosecutor. The jury's mere observation of various defense counsel approaching the bench from time to time in order to voice objections can hardly be deemed equivalent to the jury's exposure to colloquy between counsel prejudicial to co-defendants. Accordingly, severance was not mandated on this basis.

Hudson raises two severance contentions in which he is not joined by other defendants. First, Hudson contends that part of Muhammad's cross-examination of Agent Vaughan prejudiced him and required severance. We have carefully reviewed the cross-examination which Hudson now challenges. It consists of a very brief series of questions relating to surveillance of Hudson's arrival in El Paso. Agent Vaughan did not purport to answer these questions on the basis of first-hand knowledge. He specifically qualified his responses in terms of what he "imagined" had happened in El Paso. Moreover, his responses were consistent with previous testimony from other witnesses and did not conflict in any way with Hudson's defense, which contained no denial of the trip to El Paso. Thus, we find the cross-examination challenged by Hudson to have had no prejudicial effect upon him.

Secondly, Hudson contends that even if the individual reasons he cites for severance are insufficient, they cumulate to a level of prejudice that mandates severance. The cases Hudson relies upon in support of this contention stand simply for the principle that a trial judge has a continuing duty to grant severance if prejudice appears. The close scrutiny which we have directed to the record in this case in weighing the myriad severance contentions of Hudson and his co-defendants convinces us that the trial court admirably exercised its continuing duty to prevent prejudice to individual defendants as a result of the joint trial and that prejudice requiring severance did not materialize at trial. Thus, the court did not abuse its discretion in refusing to grant severance on the basis of any of the individual grounds advanced by defendants or on the basis of the combined effect of these grounds.

III

Hudson, Mims and Muhammad attack the sufficiency of the evidence supporting their convictions. Certain well known principles apply to the appellate review of the sufficiency of evidence underlying jury verdicts of guilty. It is our duty to view the evidence in the light most favorable to the verdict rendered. *Glasser v. United States*, 315 U.S. 60, 80 (1942). We must accept as established all reasonable inferences from the evidence that tend to support the jury's verdict. *United States v. Overshon*, 494 F.2d 894 (8th Cir.), *cert. denied*, 419 U.S. 853 (1974). It is the general rule that the evidence need not "exclude every reasonable hypothesis except that of guilt, but simply that it be sufficient to convince the jury beyond a reasonable doubt that the defendant is guilty." *United States v. Shahane*, 517 F.2d 1173, 1177 (8th Cir.), *cert. denied*, 423 U.S. 893 (1975). Furthermore, since circumstantial evidence is intrinsically as probative as direct evidence, *Holland v. United States*, 348 U.S. 121, 140 (1954), this standard also applies where a conviction rests entirely on circumstantial evidence. *United States v. Carlson*, No. 76-1363, slip op. at 22 (8th Cir. Dec. 17, 1976). Relying upon these familiar principles, we will now address defendants' attacks upon the sufficiency of the evidence supporting their convictions.

The threshold question is whether the existence of a conspiracy was established. "The offense of conspiracy consists of an agreement between the conspirators to effect the object of the conspiracy." *United States v. Skillman* 422 F.2d 542, 547 (8th Cir.), *cert. denied*, 404 U.S. 833 (1971). The agreement need not be express or formal. It may be established by circumstantial evidence. *United States v. Hutchinson, supra* at 490; *Koolish v. United States*, 340 F.2d 513, 523-24 (8th Cir.), *cert. denied*, 381 U.S. 951 (1965). A review of the record here reveals abundant evidence from which the jury could find the existence of a conspiracy to distribute heroin and cocaine. The facts of this case have already been recited and need not be repeated in detail here.

It will suffice to say that the testimony of Agent Vaughan, Juan Pablo Garcia and Anderson Jackson and the evidence derived from extensive surveillance and from court-authorized wiretaps was more than sufficient to establish the nature and existence of a well organized and adroitly conducted conspiracy to distribute heroin and cocaine.

Hudson, who was charged only with conspiracy, contends that evidence of his involvement therein was legally insufficient. The principal evidence probative of his participation in the conspiracy was established by the testimony of Juan Pablo Garcia, a co-defendant who had pled guilty prior to trial. After the partial credit transaction between Garcia and Jardan for one kilogram of heroin went sour, Garcia demanded the return of the narcotics. Jardan informed Garcia that the heroin would be returned to him in El Paso, Texas, by a man with a missing finger.[13] Following this telephone conversation, Hudson took a commercial flight to El Paso. Upon his arrival at Garcia's motel room in El Paso, Garcia asked Hudson "if he had the stuff with him." Hudson replied affirmatively, removed a package containing heroin from his suitcase and handed it to Garcia. Garcia immediately perceived that the package did not contain the original full kilogram of heroin and confronted Hudson with the obvious shortage: "You know, you're short with this. This is not the whole kilo." Hudson replied: "Well, I don't know anything about it. They just gave me this to give back to you." Hudson then offered to call Jardan in Kansas City in order to find out what was going on. He made a telephone call during which first he and then Garcia talked to Jardan. Garcia expressed his anger at the "rip-off" to Jardan, who denied any shortage. Upon Garcia's announcement that he was going to leave, Hudson asked for the money. Garcia responded that he could

[13]At trial, Hudson was required to display his left hand, which has a missing index finger, to the jury. Garcia also identified Hudson at trial as the man who returned the heroin to him in El Paso.

not give the money back as a result of the shortage. Garcia then left with the narcotics and Hudson subsequently returned to Kansas City.

Hudson does not deny his participation in the return of the heroin to Garcia in El Paso. He contends, however, that he did not know that the package he carried in his role as courier contained narcotics and that consequently the requisite element of his knowledge of the conspiracy was not established.[14] In support of this contention, he cites his response of "I don't know anything about it" to Garcia's allegation that the kilo of heroin was short. The jury could have reasonably inferred that this disclaimer applied to knowledge of the shortage, which was the topic of their conversation, and not to the identity of the substance that was delivered by Hudson. Hudson had not, after all, disclaimed knowledge when he responded affirmatively to Garcia's initial inquiry as to whether he had "the stuff," a commonly used name for heroin. Also, Hudson's instruction to recover the $7,000 partial payment for the drugs, coupled with all the circumstances surrounding his trip to El Paso, conveyed knowledge of illicit activity. Knowledge may be inferred by the jury from the circumstances, acts and conduct of the parties. *Jacobs v. United States*, 395 F.2d 469, 472 (8th Cir. 1968). There was sufficient evidence establishing Hudson's knowing role as a courier of narcotics to convince the jury beyond a reasonable doubt that he was guilty of participating in a conspiracy to distribute heroin.

[14]Hudson relies chiefly on *United States v. Amato*, 495 F.2d 545 (5th Cir.), *cert. denied*, 419 U.S. 1013 (1974) and *Miller v. United States*, 382 F.2d 583 (9th Cir. 1967), *cert. denied*, 390 U.S. 984 (1968), in support of his contention that knowledge of the conspiracy was not established. The holdings in *Amato* and *Miller* that knowledge had not been established devolved from findings that there was an insufficient factual basis from which knowledge could be inferred. We find the factual basis in the present case, which shows Hudson to have been a cog in a finely tuned mechanism for the distribution of narcotics, to be sufficient to support the inference that Hudson knowingly participated in the illegal conspiracy.

Mims was convicted of participation in the conspiracy to distribute narcotics and of two substantive counts of distribution of heroin. The Government's case against Mims, which consisted mainly of circumstantial evidence, was derived from testimony of a co-conspirator, Juan Pablo Garcia, surveillance by Government agents and interception of certain of Mims' telephone conversations by means of court-authorized wiretaps. It is axiomatic that a conviction for conspiracy may be supported by purely circumstantial evidence. In fact, this court has long recognized that "[a] conspiracy is rarely susceptible of proof by direct evidence. It may be adduced from the conduct of the parties and the attending circumstances." *Rizzo v. United States*, 304 F.2d 810, 825 (8th Cir.), *cert. denied*, 371 U.S. 890 (1962); *Goode v. United States*, 58 F.2d 105, 107 (8th Cir. 1932). Similarly, because circumstantial evidence is intrinsically as probative as direct evidence, *Holland v. United States*, *supra*, it may clearly be the sole basis for convictions for substantive offenses. *See, e.g., United States v. Diggs*, 527 F.2d 509, 512 (8th Cir. 1975). While Mims does not contest these well-settled principles, his attack on the sufficiency of the evidence nevertheless consists of little more than an attempt to belittle the largely circumstantial nature of the Government's case.

The circumstantial evidence against Mims was, however, substantial and the jury could reasonably have concluded that Mims participated in two substantive distributions of heroin which furthered the criminal conspiracy charged. Insofar as Count VIII, the illegal distribution of 28 grams of heroin by Mims and Jackson on May 13, 1975, is concerned, the record reveals the following salient evidence of Mims' complicity. On May 9, 1975, a telephone conversation between Jackson and Mims was intercepted in which Jackson informed Mims that he had dropped off some suits[15] which "they liked." On May

[15] Agent Vaughan testified that in narcotics deals with Jackson the term "suit" was sometimes used to refer to narcotics. The use of such terminology, often designated a "laundry code," is not unique to this case. *See United States v. Manfredi*, 488 F.2d 588, 592 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974).

13, Agent Vaughan arranged to buy one ounce of heroin from Jackson. Approximately fifteen minutes after this purchase was set up, Jackson called Mims and stated that he wanted the "same suit all the way up," which Mims agreed to deliver immediately. Surveillance revealed that Mims then drove to Jackson's home, and that shortly thereafter Jackson went from his home to Agent Vaughan's apartment and sold him one ounce of heroin. The jury could reasonably infer that Mims was instrumental in this distribution of heroin to Agent Vaughan on May 13.

Count X involves the distribution of 138 grams of heroin by Mims and Jackson on June 5, 1975. The evidence adduced showed that Jackson agreed to sell Agent Vaughan seven ounces of heroin on that date. After telling Vaughan that he was still in the process of putting things together, Jackson met with Mims and Muhammad at Muhammad's residence. Mims and Jackson proceeded to drive each other's cars from Muhammad's residence to a motel parking lot, where they talked and then switched cars. Shortly after this meeting and car exchange, Jackson delivered five of the seven ounces of heroin agreed upon to Agent Vaughan. He promised to return with the remaining two ounces as quickly as possible. Jackson then returned to the motel parking lot and met Mims again. After a conversation and another exchange of cars with Mims, Jackson drove Mims' car to the residence of Muhammad. Mims and Jackson then returned to the motel parking lot for another rendezvous and car exchange. Immediately thereafter Jackson delivered the remaining two ounces of heroin to Agent Vaughan. He then returned directly to the motel parking lot where he again spoke with Mims. We believe that as to Count X, the jury could reasonably have concluded that Mims participated in the distribution of seven ounces of heroin to Agent Vaughan on June 5, 1975. The evidence in this case, although circumstantial, is sufficient to have convinced the jury beyond a reasonable doubt that Mims was guilty not only of Counts VIII and X but also of the conspiracy to distribute narcotics for which these substantive

offenses served as overt acts. In addition, there is direct evidence of Mims' participation in the conspiracy. Garcia testified that Mims was present when he and Jardan negotiated the deal in El Paso for the purchase of one kilogram of heroin.

Muhammad was convicted of engaging in the conspiracy to distribute narcotics and of two substantive counts of distribution of heroin. Count X charged Muhammad, Jackson and Mims with the distribution of seven ounces of heroin to Agent Vaughan on June 5, 1975. Some details of this transaction have been set forth above in connection with Mims' attack on the sufficiency of the evidence. Insofar as Muhammad is concerned, the Government's evidence established that after Jackson had agreed to sell Vaughan seven ounces of heroin on June 5 and had described himself to Vaughan as "still putting things together," he met with Muhammad and Mims at the residence of Muhammad. Jackson then delivered only five of the seven ounces of heroin due Agent Vaughan, agreeing to return with the remainder as quickly as possible. Jackson drove to Muhammad's residence shortly after leaving Agent Vaughan's apartment and subsequently delivered the remaining two ounces to Agent Vaughan. Upon completion of the sale, Jackson returned to Muhammad's residence. Based on this evidence, the jury could reasonably infer that Muhammad was instrumental in this distribution of heroin to Agent Vaughan on June 5, 1975.

Count XV charged Muhammad and Jackson with the distribution of thirteen grams of heroin on July 23, 1975. At approximately 9:00 a.m. on July 23, Agent Vaughan and Jackson arranged to meet later in the day to consummate a sale of heroin. Surveillance revealed that at about 9:45 a.m., Muhammad drove his car in front of Jackson's residence, sounded the horn and then drove on. Several hours later Muhammad returned to and entered Jackson's residence, where he stayed for a short period of time. After Muhammad's departure, Jackson went from his residence to Agent Vaughan's apartment and there sold him approximately

fourteen grams of heroin for $1,600. Jackson drove directly to Muhammad's residence after the sale and conferred with Muhammad for a few minutes. Muhammad was arrested shortly after this meeting with Jackson. The serial numbers of each of the bills used by Agent Vaughan to pay Jackson for the fourteen grams of heroin had been pre-recorded. A search of Muhammad's person following his arrest produced $1,000 in pre-recorded bills. The other $600 from the sale was found on Jackson. The $1,000/$600 split of the proceeds between Muhammad and Jackson approximated the 60/40 supplier-seller split, discussed below, used by James Jackson when his brother sold narcotics for him, except that in this instance Muhammad received the 60% supplier's share. From the basis of circumstantial and direct evidence presented, the jury could reasonably infer that Muhammad participated in the July 23, 1975, sale of heroin to Agent Vaughan.[16]

The jury was presented with sufficient evidence to have convinced it beyond a reasonable doubt that Muhammad was guilty of these two substantive narcotics offenses, which were also overt acts in furtherance of the conspiracy to distribute narcotics. The Government's evidence of Muhammad's participation in the conspiracy was not limited to proof of these two acts, however. There was also abundant evidence of frequent contacts between Muhammad and Jackson during negotiations by Jackson for sales of narcotics and preceding and following these sales. The details of these contacts, which were not limited to June 5 and July 23, have been set forth previously and need not be repeated here. Finally, a

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[16]We note that Muhammad offered an exculpatory explanation of his possession of the money as well as of certain other facts underlying the indictment. These explanations raised a question of credibility, the resolution of which rested solely in the province of the jury. *Petschel v. United States*, 369 F.2d 769, 711 (8th Cir. 1966). The jury was not required to believe Muhammad's story. *United States v. Miller*, No. 76-1584 (8th Cir. Nov. 4, 1976); *United States v. Ordones*, 469 F.2d 70 (9th Cir. 1972).

co-conspirator's statement implicating Muhammad in the conspiracy was introduced into evidence by the Government. Anderson Jackson, the brother of defendant James Jackson, testified that James, for whom he was distributing heroin, had told him that Muhammad was involved in selling drugs.

The rule is well established that a statement by a co-conspirator made during the course and in furtherance of a conspiracy is not hearsay and may be admitted against the declarant and his co-conspirators so long as a conspiracy is established by independent evidence. *United States v. Kelley*, 526 F.2d 615, 618 (8th Cir. 1975), *cert. denied*, 424 U.S. 971 (1976); *United States v. Frol*, 518 F.2d 1134, 1136 (8th Cir. 1975). There is no requirement that the independent evidence of conspiracy be introduced prior to the introduction of the co-conspirator's statement. The order of proof is a matter left to the discretion of the trial court. *United States v. Kelley, supra; Brinlee v. United States*, 496 F.2d 351, 354 (8th Cir.), *cert. denied*, 419 U.S. 878 (1974). Accordingly, the co-conspirator's statement may be conditionally admitted subject to being "connected up" subsequently by independent proof of conspiracy, which may be totally circumstantial. *United States v. Sanders*, 463 F.2d 1086, 1088 (8th Cir. 1972). This was the manner in which James Jackson's statement about Muhammad's involvement in the sale of narcotics was admitted.

The record in the present case is replete with independent proof of conspiracy sufficient to "connect up" James Jackson's statement as to Muhammad's involvement in narcotics transactions. Moreover, prior to Anderson Jackson's testimony, the trial court instructed the jury with extreme care and at considerable length that a conspirator's statement could be considered against his co-defendants only if their participation in the conspiracy was established by independent evidence. A similar instruction was repeated at the close of the trial. Thus, we find no error in the manner in which Anderson Jackson's testimony was admitted.

Not every extra-judicial statement by a conspirator is admissible against his co-conspirators, however, no matter how abundant the independent evidence of a conspiracy. In addition, under the Federal Rules of Evidence, the statement must have been made during the course of the conspiracy and in furtherance thereof. Fed. R. Ev. 801 (d)(2)(E). There is no general agreement as to the wisdom of the "in furtherance" requirement. The drafters of the Model Code of Evidence eliminated this requirement. Model Code of Evidence Rule 508 (1942). Following strenuous debate, it was retained by Congress in the Federal Rules of Evidence.[17] The fact that the federal courts have not applied the "in furtherance" requirement uniformly reflects the long-standing divergence of opinion over the validity of this requirement. Interpretations range from its strict application, *see United States v. Birnbaum*, 337 F.2d 490 (2d Cir. 1964), to its reduction to a concept of relevancy, *see International Indemnity Co. v. Lehman*, 28 F.2d 1 (7th Cir.), *cert. denied*, 278 U.S. 648 (1928). The approach in this circuit has been to retain the "in furtherance" requirement, while acknowledging a tendency on the part of commentators to construe this provision broadly. *United States v. Harris*, No. 76-1380 (8th Cir. Dec. 7, 1976); *United States v. Rich*, 518 F.2d 980 (8th Cir. 1975), *cert. denied*, ____ U.S. ____ (1976); *United States v. Overshon*, 494 F.2d 894, 899 (8th Cir.), *cert. denied*, 419 U.S. 853 (1974).

We must, therefore, determine whether the statement of James Jackson introduced into evidence through the testimony of Anderson Jackson was "in furtherance" of the conspiracy to distribute narcotics. Anderson testified that in December, 1974, he had begun to sell narcotics supplied to

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[17] *See Hearings on the Proposed Rules of Evidence Before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary*, 93rd Cong., 1st Sess., House Hearings Supp. at 56, 58, 59 (1973), *reported in* Am. Jur 2d *Federal Rules of Evidence*, Appendix 4 at 314, 316, 317 (1975).

him by his brother James, who took 60% of the proceeds and left 40% for Anderson. In February, 1975, Anderson was arrested for a non-narcotics offense and incarcerated for a few days. Upon his release, he renewed his narcotics selling activities. In early March, Anderson entered a hospital in order to receive treatment for his narcotics habit. He recommenced using and selling narcotics shortly after his release. In mid-March, 1975, Anderson was again incarcerated for a non-narcotics offense. He remained in jail for approximately two weeks. It was during a visit with Anderson shortly after his release from jail that James made the statement implicating Muhammad in the narcotics conspiracy. Anderson testified that:

> [James] told me he got demoted from captain in the Muslims because he was selling drugs and that Nathaniel Muhammad was involved in selling drugs; that he demoted him from captain where it would look good for the Muslims in case something came down.

It is reasonable to conclude that this statement was made in an effort by James to again enlist Anderson as a seller of narcotics for the conspiracy. Anderson had previously returned to this occupation following release from each incarceration or institutionalization. Thus, after a longer than usual stay in jail, it would be reasonable for James to want to assure Anderson's continued participation in the conspiracy and to apprise him of developments that Anderson might be unaware of because of his incarceration. *Cf. United States v. Overshon, supra*. Thus, although it is a close question, we believe that James Jackson's statement to Anderson concerning Muhammad's involvement in the sale of narcotics was in furtherance of the conspiracy. Since it was clearly made in the course of the conspiracy and was "connected up" by sufficient independent evidence of conspiracy, this statement was properly admitted under Rule 801(d)(2)(E). We conclude that the Government's evidence was sufficient to have convinced the jury beyond a reasonable doubt that Muhammad was guilty of conspiring to distribute narcotics and of participating in two sales of heroin.

IV

The Government introduced into evidence eleven taped conversations intercepted pursuant to three court orders authorizing the interception of wire communications. All defendants moved unsuccessfully to suppress the introduction of these conversations into evidence. On appeal, however, only Hudson and Jardan have asserted error in the trial court's denial of their motions to suppress. They challenge the legality of the wiretaps on two grounds. First, Jardan contends that pursuant to 18 U.S.C. §2518(1)(b)(iv) (1970) and 18 U.S.C. §2518(4)(a) (1970) he should have been named as a party whose communications would be intercepted by the wiretaps authorized on May 9, 1975, and May 29, 1975. Hudson makes an identical contention as to the wiretap authorized on June 24, 1975. Secondly, both Jardan and Hudson contend that the wiretaps were improper under 18 U.S.C. §2518(3)(c) (1970) because normal investigative techniques would have sufficed under the circumstances of this case.

Naming Requirements

18 U.S.C. §2518(1)(b)(iv) requires that an application for an order authorizing the interception of a wire communication include "the identity of the person, if known, committing the offense and whose communications are to be intercepted." Section 2518(4)(a) requires that the order of authorization specify "the identity of the person, if known, whose communications are to be intercepted." Jardan challenges WT-1975-1, May 9, 1975, and WT-1975-2, May 29, 1975, on the grounds that he was not named in the applications or authorization orders as a person whose communications were to be intercepted, despite the fact that at the time of the applications the Government allegedly had knowledge of him which required his identification under §§2518(1)(b)(iv) and 2518(4)(a).

The May 9, 1975, application for WT-1975-1, a tap on the telephone of James Jackson, sought authorization to intercept communications of Jackson, Muhammad and "others as yet unknown" concerning various narcotics offenses. Jardan's name was not mentioned in the application or in the order authorizing WT-1975-1. The May 29, 1975, application for WT-1975-2, a tap on the telephone of Spencer Mims, sought authorization to intercept communications of Mims, Jackson and "others as yet unknown" concerning various narcotics offenses. Jardan was not identified as a person whose communications were to be intercepted. The application did state, however, as did the order authorizing the wiretap, that there was probable cause to believe that Mims, Jackson, Muhammad and Jardan, *inter alia*, were involved in committing narcotics offenses. Conversations by Jardan were intercepted pursuant to both wiretaps.

Hudson's contention involves a third wiretap not challenged by Jardan, WT-1975-3. The June 24, 1975, application for WT-1975-3, taps on the telephones of Spencer Mims and Lushrie Jardan, sought authorization to intercept communications of Muhammad, Mims, Jardan, Jackson and "others as yet unknown" concerning various narcotics offenses. Hudson was not identified as a person whose communications were to be intercepted. The application, was well as the order authorizing the wiretap, did state, however, that there was probable cause to believe that Mims, Jackson, Muhammad, Jardan and Hudson, *inter alia*, were involved in the commission of narcotics offenses. Conversations of Hudson were intercepted on WT-1975-3.

Jardan and Hudson contend that the Government had probable cause to name them in its applications pursuant to §2518(1)(b)(iv) as known individuals whose communications were to be intercepted. Accordingly, they argue that they should have been so designated in the wiretap orders under §2518(4)(a) and that their non-identification in the applications and orders required suppression of the conversations intercepted. We note that since it is only through reference to

the Government's applications that the authorizing judge can be expected to learn of the target individuals, the identification requirements of §§2518(1)(b)(iv) and 2518(4)(a) have been deemed to be of equal breadth. *United States v. Kahn*, 415 U.S. 143, 152 (1974).

Section 2518(1)(b)(iv) requires that in a wiretap application, the Government specify "the identity of the person, if known, committing the offense and whose communications are to be intercepted." This provision has been interpreted to require that the Government name an individual in an application if it has probable cause to believe (1) that the individual is engaged in the criminal activity under investigation and (2) that the individual's conversations will be intercepted over the target telephone.[18] *United States v. Kahn, supra; see United States v. Donovan*, 45 U.S.L.W. 4115, 4118 (U.S. Jan. 18, 1977). This latter requirement applies to persons placing calls to or from the target telephone. *United States v. Donovan, supra* at 4118.

[18]We note that *United States v. Donovan, supra*, appears to contain two slightly divergent interpretations of the naming requirement of §2518(1)(b)(iv). The Court initially cites *United States v. Kahn*, 415 U.S. 143 (1974) for the proposition that §2518(1)(b)(iv) requires probable cause to believe that the individual is engaged in the criminal activity under investigation and probable cause to believe that the individual's conversations will be intercepted over the target telephone. *United States v. Donovan, supra* at 4118. The Court then holds that a wiretap application must name an individual if the Government "has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone." Assuming that probable cause to believe differs from expectation, we do not believe that the Supreme Court intended to depart from the probable cause standard set forth in *United States v. Kahn, supra*. This interpretation is supported by the partial dissent of Justices Marshall and Brennan, which states the majority holding to be that an application for a wiretap "must name all individuals whom the Government has probable cause to believe are committing the offense being investigated and will be overheard." *United States v. Donovan, supra* at 4124.

Jardan and Hudson each allege that the Government failed to name him under §2518(1)(b)(iv), although it had probable cause to do so. Even if we assume *arguendo* that the Government did have probable cause to believe that Hudson and Jardan were engaged in the criminal activity under investigation, we do not believe that the record sustains a finding that there was probable cause to believe that their communications would be intercepted over the target telephone. A close reading of the record reveals that the only knowledge that can fairly be attributed to the Government related to Hudson's and Jardan's mere association with persons under investigation. We find knowledge of mere association insufficient, under the facts of this case, to support the conclusion that the Government had probable cause to believe that Hudson and Jardan would be intercepted over the target telephone.

The Government lacked probable cause to believe that Hudson and Jardan were persons "committing the offense and whose communications [would] be intercepted" and did not, therefore, violate §2518(1)(b)(iv) in omitting Hudson's and Jardan's names from the wiretap applications challenged. Thus, the wiretap orders based on these applications were valid and in conformance with §2518(4)(a) and the trial court did not err in refusing to suppress the conversations intercepted pursuant to these wiretaps.[19]

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[19]We note that even had the Government possessed probable cause to believe Jardan and Hudson were engaged in the criminal activity under investigation and that they would be intercepted on the target telephones, suppression would not be mandated here. There is no suggestion that Government agents knowingly failed to identify Jardan and Hudson in order to keep relevant information from the District Court. Accordingly, because identification in an intercept application of all those likely to be overheard in incriminating conversations does not play a "substantive role" with respect to judicial authorization of intercept orders and thus does not impose a limitation on the use of intercept proceedings, suppression is not warranted under §2518(10(a)(i). *United States v. Donovan, supra* at 4121-22.

Utilization of Normal Investigative Techniques

18 U.S.C. §2518(1)(c) requires that an application for an order authorizing the interception of a wire communication include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. §2518(3)(c) requires that the judge to whom the wiretap application is directed authorize a wiretap only if he determines on the basis of the facts submitted by the applicant that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." Jardan and Hudson both contend that the applications for the wiretaps at issue here were deficient under §2518(1)(c) and that there was, therefore, an insufficient basis for their authorization under §2518(3)(c).

The Supreme Court has stated that the language of §§2518(1)(c) and 2518(3)(c) "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States v. Kahn*, 415 U.S. 143, 153 n. 12 (1974). In enacting Title III, Congress did not require the exhaustion of "specific" or "all possible" investigative techniques before wiretap orders could issue. *United States v. Smith*, 519 F.2d 516, 518 (9th Cir. 1975). Congress prohibited wiretapping only when normal investigative techniques were likely to succeed and not too dangerous, *United States v. Daly*, 535 F.2d 434, 438 (8th Cir. 1976), and "[m]erely because a normal investigative technique is theoretically possible, it does not follow that it is likely." S. Rep. No. 90-1097, 90th Cong., 2d Sess. ____, *reprinted in* [1968] U.S. Code Cong. and Admin. News, 2190. Thus, §§2518(1)(c) and 2518(3)(c) have been deemed to be designed only to ensure that wiretapping is not "routinely employed as the initial step in criminal investigation." *United States v. Giordano*, 416 U.S. 505, 515 (1974).

The issue of whether the provisions of §§2518(1)(c) and 2518(3)(c) have been complied with must be determined by viewing the facts contained in the Government's sworn applications and supporting affidavits. These applications and affidavits must be tested in a "practical and commonsense fashion." *United States v. Brick*, 502 F.2d 219, 224 n. 14 (8th Cir. 1974); *see United States v. Kirk*, 534 F.2d 1262, 1274 (8th Cir. 1976). Moreover, as in other suppression matters, the judge to whom the wiretap application is made is entrusted with broad discretion. *United States v. Daly, supra.*

In the present case, each application for a wiretap was supported by an affidavit of Agent Vaughan, the key investigative figure involved. We have carefully reviewed the applications for WT-1975-1, WT-1975-2 and WT-1975-3 and the affidavits of Agent Vaughan that accompany them. These affidavits establish unequivocally that traditional investigative techniques had been used extensively before authorization for wiretaps was sought. Agent Vaughan's affidavits also detail the reasons why these normal investigative techniques had failed and were likely to continue to fail. Moreover, the affidavits cited specific instances of failures which established that the utilization of normal techniques was not only unlikely to succeed but also likely to create risks of unreasonable danger. We conclude that the applications for the wiretaps at issue here were sufficient under §2518(1)(c) and that the wiretap authorization orders met the requirement of §2518(3)(c). Accordingly, the trial court did not err in denying defendants' motions to suppress the communications intercepted pursuant to WT-1975-1, WT-1975-2 and WT-1975-3.

Judgment affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

76-1105 September Term, 1976

The United States, Appellee,	)	
vs.	)	Appeal from the United States
	)	District Court for the Western
Spencer Mims, Appellant.	)	District of Missouri

On motion of counsel for appellant, it is now here ordered that appellant may have to and including February 28, 1977, in which to serve and file petition for rehearing.

February 22, 1977

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

76-1105 September Term, 1976

The United States, Appellee,	)	
vs.	)	Appeal from the United States
	)	District Court for the Western
	)	District of Missouri
Spencer Mims, Appellant.	)	

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

March 10, 1977

SUPREME COURT OF THE UNITED STATES

No. A-184

SPENCER MIMS,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 9, 1977.

/s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 6th day of April, 1977.